88-540

No._____

Supreme Court, U.S.
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CLERK

IN THE

Supreme Court of the United States

October Term, 1988

MARK VANNELLI,

Petitioner,

vs.

THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA AND MINNESOTA COURT OF APPEALS

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September, 1988

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QUESTION PRESENTED

Do student-athletes have standing under the "business *or* property" provision of Section 4 of the Clayton Act? (emphasis added herein)

PARTIES TO THIS PROCEEDING

The school, Northern Michigan University ("NMU") is not a party to this proceeding. The common law claims are pending against NMU in the State Court.

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IN THE

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NO. ———

MARK VANNELLI,

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA AND MINNESOTA COURT OF APPEALS

OPINIONS BELOW

Petitioner has no knowledge of any "official" or "unofficial" reports of any of the opinions of the courts below. The United States District Court did not write an opinion.

JURISDICTION

The Minnesota Supreme Court denied a Petition for Review on June 29, 1988. This Petition was filed within 90 days thereof. The Minnesota Court of Appeals filed its opinion [unpublished] on April 19, 1988. The United States District Court for the District of Minnesota issued its Order for the NCAA on September 26, 1985, and amended it by an Order *Nunc Pro Tunc* on December 4, 1985. The United States District Court denied, as untimely, Petitioner's Rule 60 motion for reconsideration filed after the State Court applied collateral estoppel. Jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3).

STATUTORY PROVISIONS

Section 4, Clayton Act. (October 15, 1914, Chap. 323, Sec. 4, Stat. 731, 15 U.S. Code, Sec. 15.)

Sec. 4. "That *any person* who shall be *injured* in his *business or property* . . ." [emphasis herein]

Minnesota Antitrust Law, 325 D.57. ". . . any person injured . . ."

STATEMENT OF THE CASE

Petitioner was a high school hockey player in Minnesota in 1980 when he was recruited by Northern Michigan University ("NMU"). He was induced to sign with NMU by the usual promise of a 4-year scholarship plus the incentive of playing at an NCAA Division I school at a professional development level. He signed on April 15, 1980 at 10:30 p.m. what the NCAA titles a "National Letter of Intent," and a "Financial Assistance" form. In the fall of 1981, the coach "cut" him

from the team and told him his scholarship would terminate that academic year. [no fault of his own]

To preserve his playing development and to earn another scholarship and to meet NCAA time restraints on eligibility after his transfer, Petitioner had to leave NMU immediately. He contacted the University of Minnesota [an NCAA Division I member] hockey coach but was told NCAA Rules restricted his eligibility and so no athletic scholarship/financial aid could be given to him for a year when he would be fully eligible to play varsity hockey. The NCAA Rules barred him from championships thus *effectively* excluding him for a year. Thus, not being a "free agent" able to bargain for his playing services, he enrolled in St. Thomas College in St. Paul, Minnesota, at only an NCAA Division III level of competition, where he began playing the next season but without athletic financial aid.

Petitioner first sued in Federal Court, but because of the dismissal of NMU under the Eleventh Amendment, filed against both defendants over in State Court in the interest of judicial economy. The defendants quickly moved for summary judgment on collateral estoppel, based on the State Antitrust Law being held to be identically applicable as the Federal Antitrust Law. The State Courts so held.

Petitioner claims that the NCAA restrictions on his transfer rights injured him in *both* his "business" (athletic services) and his "property" (lessened his athletic earning power for paying his schooling expenses and increased his out-of-pocket costs of his schooling). He also suffered common law damages, such as emotional distress and defamation, in addition to the antitrust damages to his "business or property."

ARGUMENT

The time is "ripe" for this Court to decide this question. This case gained national attention in the Sports Section of *The New York Times*, Monday, November 24, 1986, in a by-line story.

Professor Arthur Miller of the Harvard Law School conducted a mock trial on the subject on his television show titled "Headlines On Trial," from Washington, D.C. on November 26, 1987. He introduced the issue as follows:

> ". . . *for college athletes sport is hard work for which there is no pay—or is there?* . . . Big time college athletics is big business . . . athletes are amateurs in name only . . . *scholarships are payments tied to performance . . .*" (emphasis herein) [Petitioner has a tape of the show available for this Court.]

In 1988, Hollywood released an exploitive movie on the subject, titled "Johnny Be Good," including a ridiculing depiction of the NCAA recruiting system.

On national television, Saturday, September 17, 1988, the University of *Michigan* demonstrated at half-time how it had arranged for 25 to 35 of the top high school players across the country to watch, on television, Michigan's big home-opener with number one ranked Miami [whose star quarterback was recruited out of Petitioner's hometown, St. Paul, Minnesota]. A Michigan recruiter talked "live" on the phone on television with one of the prospects and assured the public it was all within NCAA Rules.

The remarks over the telephone by Petitioner's coach at NMU to this attorney for Petitioner, in 1981, condemned the punishing restraint by the NCAA on Petitioner:

". . . The NCAA *rule is atrocious* . . . He'll have to sit out a year or sixteen weeks depending on what kind of school he goes to . . . That's a tremendous injustice . . . I will photocopy the NCAA manual . . . The kid is left with no alternative . . . He's got to preserve two things, one, academics and two, his athletic ability . . . He should be allowed to play immediately . . . because it's not his choice to transfer . . . In essence we're punishing the boy by not renewing . . . so the boy's being punished by the NCAA by not being allowed to play . . . I don't think in a, in a, *in a court that if the NCAA were ever tested on that, that they would have a leg to stand on.* But it's like so many rules that they have that just aren't tested for any number of reasons." (emphasis added herein)

Obviously, the NCAA cannot withstand scrutiny under the "rule of reason," should standing be afforded student-athletes here.

The two key provisions of the NCAA Rules are set forth here for attention and ease of reference as follows:

(1) "PLAY-FOR-PAY"
("Quid Pro Quo")

NCAA Constitution 3-4-(d) (1979-80):

"Where the student-athlete's *ability is taken into consideration in any degree in awarding unearned financial aid,* such aid shall not be awarded for a period in excess of one academic year;" [A25] (emphasis herein)

(2) RESTRICTED TRANSFER

NCAA By-laws, 5-1-(j)-(7) (1981-82):

"A transfer student from a four-year institution shall not be eligible for any NCAA championship until the student has fulfilled a residence requirement of one full academic year (two full semesters or three full

Many student-athletes play to pay for their education which their parents could not otherwise afford. *Eg. New York Times*, July 23, 1987, page Y43, "Recruiting Pressure Extends To Women" ($13,000 per year). In *The St. Paul Pioneer Press Dispatch*, (Minnesota), March 15, 1988, page 3C, sports columnist Charley Walters reported that a local high school athlete had "accepted a baseball tender from U.S.C. valued at $90,000 for four years."

CONCLUSION

With regard to *schools*, this Court decided *NCAA v. Board of Regents*, 468 U.S. 85, 104 S.Ct. 2948 (1984). With regard to *coaches*, this Court is presently considering *NCAA v. Jerry Tarkanian*, No. 87-1061, October Term, 1987. Therefore, with regard to *student-athletes*, this Court should grant this Petition and decide the standing issue. The issue is important enough as a matter of national impact and interest. The NCAA has not corrected the injustice of its Rules to this date.

The issue is as concisely presented for student-athletes in this case as it was for consumers in *Reiter v. Sonotone*. May this Court please see fit to grant this Petition.

Dated: September, 1988.

Respectfully submitted,

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APPENDIX

STATE OF MINNESOTA
IN SUPREME COURT

C3-87-2039

MARK VANNELLI,

Appellant,

vs.

THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, et al.,

Respondents.

ORDER

Based upon all the files, records and proceedings herein, IT IS HEREBY ORDERED that the petition of Mark Vannelli for further review be, and the same is, denied.

Dated: June 29, 1988.

By the Court:
G. E. KELLEY
Associate Justice

STATE OF MINNESOTA
IN COURT OF APPEALS

C3-87-2039

(Title of Cause)

Filed April 19, 1988
Office of Appellate Courts

Heard, considered and decided by Norton, Presiding Judge, Kalitowski, Judge, and Schultz, Judge.*

NONPUBLISHED OPINION

NORTON, Judge

[Some facts omitted herein.]

* * *

The federal court dismissed all of appellant's claims. It reached the merits of only the constitutional and federal antitrust claims against the NCAA, holding that the NCAA's actions were not "state actions" and therefore were not subject to constitutional challenge, and that appellant lacked standing to assert claims under the federal antitrust laws in that he had not been "injured in his 'business or property' " within the meaning of those laws. The court declined to exercise pendant jurisdiction over appellant's common law and state antitrust claims against the NCAA and dismissed them without prejudice. Vannelli has not appealed that decision.

Appellant then filed the present action in state court, asserting virtually the same claims of fraud, breach of contract, tortious interference, and violation of state antitrust laws as

---

* Acting as judge of the Court of Appeals by appointment pursuant to Minn. Const. art. 6, § 2.

had been dismissed. By a March 3, 1987 order the trial court granted summary judgment in favor of the NCAA on all counts.

* * *

DECISION

Summary judgment is appropriate where no material fact issues are presented and the moving party is entitled to judgment as a matter of law. Minn. R. Civ. P. 56.03. A party may not rest on his pleadings to create fact issues where the movant has provided affidavits in support of the motion. *Eakman v. Brutger*, 285 N.W.2d 95 (Minn. 1979).

[Common law claims omitted herein.]

* * *

Appellant urges reversal of the trial court's ruling that he is collaterally estopped from asserting the state antitrust claims.

Appellant claims that because the phrase "business or property" is missing from Minn. Stat. § 325D.57 (1986), the state antitrust law differs from the similar federal antitrust law. The Minnesota statute provides that any person "injured" by a violation of the Minnesota Antitrust Law of 1971 may recover damages. Respondent points out that numerous state and federal court decisions in Minnesota have routinely construed the Minnesota statute to follow the corresponding federal law. Appellant has not provided us with any legislative history showing the judiciary should interpret state law differently from federal law, notwithstanding the minor difference in language. Additionally in this case, it is logical to conclude that if appellant was not injured in his business or property, he was not injured at all. The premise of this

lawsuit is appellant's assertion that he was restricted by NCAA rules from freely selling his amateur athletic services.

Affirmed.

4-8-88

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Civil No. 3-84-1680

(Title of Cause)

ORDER NUNC PRO TUNC

The above-captioned matter has been considered by the Court on the Motion of the Plaintiff, Mark Vannelli, under Rules 59 and 60 of the Federal Rules of Civil Procedure for relief from prior Orders of this Court dated September 26, 1985 and September 30, 1985. Based on the entire record in this matter,

IT IS ORDERED that the Order dated September 26, 1985 is hereby amended and corrected to remove the claims alleged under the Minnesota Antitrust Law (Minn. Stat. §325.49, et seq.) from the summary judgment granted in paragraph 1 of the Order.

IT IS FURTHER ORDERED that the Minnesota Antitrust claims are dismissed without prejudice as pendent state law claims.

Dated: December 4, 1985.

ROBERT G. RENNER
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Civil No. 3-84-1680

(Title of Cause)

ORDER

The captioned matter came on for hearing before the undersigned on September 25, 1985, on the motion of defendant National Collegiate Athletic Association ("NCAA") for dismissal and/or summary judgment as to the claims against it. John F. Beukema and John D. French appeared for defendant NCAA. John E. Thomas appeared for plaintiff.

Based on the memoranda and affidavits submitted by the parties and the arguments of counsel, the Court has determined that the relief requested by defendant NCAA should be granted, as follows:

1. Summary judgment is hereby granted in favor of defendant NCAA with respect to Counts I and II of the Complaint, asserting violations of sections 1 and 2 of the Sherman Act (15 U.S.C. §§1-2) and the Minnesota Antitrust Law (Minn. Stat. § 325D.49, *et seq.*), because the plaintiff was not injured in his "business or property" within the meaning of those statutes and therefore lacks standing to assert claims thereunder.

2. Summary judgment is hereby granted in favor of defendant NCAA with respect to Count VI of the Complaint, asserting violations of the Fourteenth Amendment of the United States Constitution, because the actions of the NCAA do not constitute "state action".

3. Counts III, IV, and V of the Complaint, asserting state common law claims, are dismissed without prejudice, inasmuch as this Court lacks subject matter jurisdiction over said claims.

IT IS SO ORDERED.

Dated: September 26, 1985.

ROBERT G. RENNER
United States District Judge

Transcript of proceedings (partial) had in the above-entitled matter before the Honorable Robert G. Renner, U.S. District Court, St. Paul, Minnesota, September 25, 1985.

* * *

As to the antitrust claim. The NCAA argues that plaintiff's complaint fails to state a claim under the antitrust laws. The NCAA first argues that plaintiff lacks standing under the antitrust laws. Section 4 of the Clayton Act, 15 USC, Section 15, confers standing to bring an antitrust action. It provides "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any District Court of the United States."

Now, the defendant argues that plaintiff lacks standing as an amateur student athlete, because he can't show any injury to his business or property. Plaintiff cites an Eighth Circuit case, Scott versus City of Sioux City, Iowa, which does not involve antitrust standing requirements, but discusses the state's immunity under the antitrust laws. See 736 F.2d 1207.

Plaintiff also cites Judge Larson's opinion mentioned extensively during argument, which is not an antitrust case, but a constitutional case. Moreover, it focuses on the opportunity to obtain an education, not an issue involved here.

Plaintiff argues that the requisite injury is here. He contends that there has been a definite factual showing of commercial activity by plaintiff Vannelli in playing Division I NCAA hockey.

This troubles the Court, because it's difficult for the Court to understand how amateur hockey is commercial as to the players. They cannot accept money, et cetera, for their play. But plaintiff counters this by arguing that because the scholarship was taken away, Vannelli had to pay more for his education than before.

The Court is troubled by this for several reasons. One, we find that, admittedly, the defendant gave up his year of scholarship, whereas he could have stayed at NMU for his second year. He left in mid year. Also, the Court has very grave difficulty understanding how NCAA could be in any way responsible for the decision. It is true that the play for pay provision in the NCAA constitution provides a scholarship for no more than one year, but it is also true that it provides for no less than one year. And, to the Court, it doesn't appear to be arbitrary that the association colleges, through its organization, NCAA, should have the right to establish the length of such scholarships.

The plaintiff argues that he was deprived of his right to play in championship games under the NCAA rule, whereas in fact we find he transferred to a school, St. Thomas, which was not even that year playing in NCAA tournaments by its own decision to play NAIA championship schedules.

I have to dismiss the case on grounds of lack of standing. Having dismissed the antitrust claim and the constitutional claim, the Court now dismisses the state pendant claims.

Are there any questions?

MR. THOMAS: Would dismissal of the state pendant claims be without prejudice?

THE COURT: That would be without prejudice.

All right. I will order the defendants to prepare orders individually in the light of my order so the Court can file the same.

That will be all.

Supreme Court, U.S.
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MARK VANNELLI,

Petitioner,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner claims that the legal question presented by his petition involves the standing of college athletes to sue under section 4 of the Clayton Act, 15 U.S.C. § 15. In fact, no such question was either presented to or decided by the Minnesota state courts of whose decisions the petition seeks review. Those decisions involved only questions of Minnesota law, which are not within the jurisdiction of this Court to review.

PARTIES TO THE PROCEEDINGS BELOW

This action was originally brought by petitioner, an individual, against respondent National Collegiate Athletic Association ("NCAA"), an unincorporated association of more than 900 universities, colleges, athletic conferences, and related educational institutions, and against one member of the NCAA, Northern Michigan University ("NMU"), both in their individual capacities and as representatives of a purported defendant class of all NCAA members. No defendant class was ever certified. NMU was not a party to the appellate proceedings below, review of which is sought by the petition, and some of petitioner's claims against it remain pending in Minnesota state court.

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NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JURISDICTION

Petitioner claims that this Court has jurisdiction to review the decisions below pursuant to 28 U.S.C. § 1257(3).[1] As will be argued hereafter, respondent submits that petitioner's jurisdictional allegation is erroneous and that this Court in fact does not have jurisdiction to review the decisions below, since those decisions involve only question of Minnesota law.

[1] Section 1257 has been amended effective September 25, 1988 (two days before this petition was filed), and § 1257(3) has been repealed. Act of June 27, 1988, Pub. L. 100-352, §§ 3, 7, 102 Stat. 662, 664. However, the new provision, § 1257(a), is identical in relevant part to former § 1257(3), so petitioner's mistaken invocation of the repealed provision is of no substantive significance.

RESTATEMENT OF THE CASE

The petition seeks review of a decision of the Minnesota Court of Appeals, which the Minnesota Supreme Court declined to review, affirming a summary judgment dismissing petitioner's claims against respondent National Collegiate Athletic Association ("NCAA") for alleged common law fraud, breach of contract, tortious interference with a "prospective commercially economically advantageous activity," and violation of the Minnesota Antitrust Law, Minn. Stat. § 325D.49 *et seq.* The action arose out of petitioner's career as an amateur college hockey player.

A. Factual Background

Petitioner enrolled in 1980 at Northern Michigan University ("NMU"), which had recruited him as a potential member of the school's intercollegiate hockey team and had awarded him an athletic scholarship. As a member of the NCAA, NMU's efforts in recruiting petitioner and the terms of the scholarship aid it was permitted to offer him were subject to NCAA rules, but the undisputed evidence before the state trial court when it granted summary judgment established that the NCAA had no involvement in or knowledge of NMU's recruitment efforts or the award of a scholarship to petitioner. Petitioner alleged that he was orally promised a four-year scholarship as an inducement for his enrolling at NMU, but the documents he signed before his enrollment clearly state that the scholarship was for a one-year term (subject to renewal), in accordance with NCAA rules.

Petitioner played college hockey during his freshman year at NMU, 1980–81, and his scholarship was renewed for the following year. In the fall of 1981, however, he was cut from the NMU team and was told that his scholarship would not be renewed at the end of the 1981–82 academic year.[2]

---

[2] In agreeing to continue the scholarship through the end of the academic year, rather than terminating it immediately, NMU was complying with NCAA rules prohibiting such termination.

Instead of continuing his education (and his scholarship) at NMU, petitioner departed that school at the end of the Fall 1981 term and sought another college where he could make the hockey team. He alleges that he was hampered in this search by an NCAA rule providing that students transferring from one four-year college to another were ineligible to participate in NCAA **post-season** championship competitions for a year after their transfer. Although the transfer rule on its face placed no restriction on eligibility for either scholarship aid or regular season competition, petitioner claims that it was cited by the hockey coach at the University of Minnesota as a reason why that institution would not provide him a scholarship or allow him to join the hockey team in midseason.

Petitioner ultimately enrolled in January 1982 at the College of St. Thomas in St. Paul, Minnesota, which does not grant athletic scholarships. He competed as a member of the St. Thomas hockey team in the 1982–83, 1983–84, and 1984–85 seasons, and was graduated from St. Thomas in May 1985.

The undisputed evidence offered by the NCAA in support of its successful motion for summary judgment established that the NCAA had no knowledge of or direct involvement in any of the foregoing events. There is nothing in the record to suggest that anyone from the NCAA communicated with the petitioner or any college or university concerning petitioner's recruitment by NMU, his failure to make the NMU hockey team in 1981, his abandonment of his scholarship, his possible eligibility at the University of Minnesota, his eventual transfer to St. Thomas, or his eligibility after that transfer.[3] The only basis for petitioner's purported claims against the NCAA thus was the alleged detrimental effect on him of NCAA rules, applying generally to all student-athletes, that govern eligibility of transferring students and prohibit the granting of scholarships for longer than a year.

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[3] In late February 1982, after all the above-described events had occurred, and some six weeks or more after petitioner had enrolled at St. Thomas, his attorney finally did contact the NCAA, through its attorneys.

B. Proceedings Below

Petitioner first brought suit against the NCAA and NMU in the United States District Court for the District of Minnesota. His complaint in that court alleged claims under the United States Constitution, federal and state antitrust laws, and Minnesota common law. On September 25, 1985, the district court, by the Honorable Robert G. Renner, District Judge, granted summary judgment for the NCAA on all of petitioner's federal law claims. The court held that actions of the NCAA, as a private nongovernmental entity, did not constitute "state action" and therefore could not be held to violate the Fourteenth Amendment of the United States Constitution. It further held that the NCAA rules about which petitioner complained had not caused him injury to his "business or property" within the meaning of section 4 of the Clayton Act, 15 U.S.C. § 15, and that he therefore lacked standing to claim that those rules violated the federal antitrust laws. Having disposed on the merits of all of petitioner's federal law claims against the NCAA, the district court declined to exercise pendent jurisdiction over his state law claims, which it dismissed without prejudice. Appendix ("App") at A4–A8.[4]

Thus, it is not true, as petitioner states (Petition at 3), that the case at bar was brought in Minnesota state court only "in the interest of judicial economy" after the federal district court had made it impossible for him to pursue all of his claims against both defendants in a federal forum. On the contrary, the federal district court entered judgment on the merits against petitioner on his federal law claims against the NCAA. **Petitioner did not appeal from that judgment.**[5]

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[4] The district court dismissed petitioner's claims against NMU in their entirety on the ground that NMU, as an agency of the State of Michigan, was immune from suit in federal court pursuant to the Eleventh Amendment of the United States Constitution.

[5] In July 1987, almost two years after judgment was entered against him, petitioner did move the United States District Court, apparently pursuant to Rule 60, F. R. Civ. P., "to reinstate or reopen the antitrust claims of this action" or, alternatively, to issue a written opinion replacing the court's 1985 oral opinion. The court denied this motion as untimely by order dated August 24, 1987, and petitioner did not appeal from that order.

Instead, petitioner commenced the instant action in Minnesota state court against both the NCAA and NMU, reasserting the state law claims of his federal complaint, including his claim for alleged violation of Minnesota antitrust law; he did not reassert the federal law claims that the federal court had dismissed with prejudice. By order dated March 3, 1987 (made final by order dated June 1, 1987), the Minnesota District Court for the Second Judicial District granted the NCAA's motion for summary judgment in the instant case, dismissing all of petitioner's claims against the NCAA. In the only portion of its ruling relevant to the petition, it held that the standing provision of the Minnesota Antitrust Law, Minn. Stat. § 325D.57, should be interpreted consistently with the standing provision of the Clayton Act, 15 U.S.C. § 15. Therefore, in accordance with Minnesota common law principles of collateral estoppel, the court held that petitioner was barred from relitigating in state court the question of antitrust standing that had been decided adversely to him by the federal district court judgment from which he did not appeal.[6]

The Minnesota Court of Appeals, in an unpublished opinion dated April 19, 1988, affirmed the district court's judgment in favor of the NCAA in its entirety. App. at A2–A4. The Minnesota Supreme Court denied petitioner's application for discretionary review by order dated June 29, 1988. App. at A1. The present petition was timely filed on September 27, 1988.

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[6] The court also granted summary judgment in favor of NMU as to the state antitrust claims. Petitioner's common law claims against NMU remain pending in the state trial court.

ARGUMENT

THIS COURT LACKS JURISDICTION TO REVIEW THE DECISIONS BELOW

The petition for writ of certiorari to the Minnesota Court of Appeals and the Minnesota Supreme Court should be denied. The decisions of those courts involved only questions of Minnesota antitrust and collateral estoppel law that are not within the jurisdiction of this Court to review. Moreover, those decisions did not decide — indeed, the state courts did not have jurisdiction to decide — the question of federal antitrust standing that the petition attempts to raise. That question was resolved adversely to petitioner by the judgment of the federal district court in September 1985, from which petitioner did not appeal and which therefore became final almost three years ago.

The Minnesota trial and appellate courts did not purport to decide whether petitioner had standing to sue under the Clayton Act. Petitioner's complaint in this action did not assert a cause of action under the Clayton Act, and the state courts would have been unable to decide any such claim if it had been asserted, since federal courts have exclusive jurisdiction over claims under the Sherman and Clayton Acts. *Freeman v. Bee Machine Co.*, 319 U.S. 448 (1943); *General Investment Co. v. Lake Shore & Mich. So. Ry.*, 260 U.S. 261 (1922); *Blumenstock Bros. Advertising Agency v. Curtis Publishing Co.*, 252 U.S. 436 (1920). The Minnesota courts decided only that, under applicable principles of state common law, the federal court's decision that petitioner had no standing under the Clayton Act (which they correctly accepted as given) estopped petitioner from claiming standing under the Minnesota Antitrust Law. In reaching this conclusion, the state courts also decided that the test of standing under Minnesota antitrust law was "identical" to the test of federal antitrust standing that the federal district court had applied — a matter of Minnesota statutory interpretation that did not challenge or require re-examination of the holding of the federal court.

In short, the decisions below resolved only two questions — one of state collateral estoppel law and one of interpretation of a state

statute. Neither of these qustions is within this Court's limited jurisdiction to review state court decisions, which extends only to:

> [f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had ... where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

28 U.S.C. § 1257(a). No such question was presented to or decided by the courts below.

The question of federal antitrust standing that petitioner claims is presented by his petition in fact was decided only by the United States District Court in reaching its September 1985 judgment.[7] Petitioner could have obtained review of that decision by appealing the judgment to the United States Court of Appeals for the Eighth Circuit. He did not do so, and the opportunity for such review has long since been lost. Having failed to take the appeal that was available to him within the federal judicial system, petitioner cannot obtain "back-door" review of the United States District Court's decision merely because Minnesota courts, deciding questions of Minnesota law, gave that decision the effect to which its finality entitled it under state law.

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[7] Contrary to petitioner's contention (Petition at 6), the judgment of the federal district court on this question is not at odds with the recent decision in *McCormack v. NCAA*, 585 F.2d 1338 (5th Cir. 1988). In *McCormack*, the Fifth Circuit expressly refused to decide whether the football player-plaintiffs had antitrust standing, but merely assumed that they did. *Id.* at 1343. The court went on to hold that the plaintiffs' allegation that the NCAA's rules limiting scholarship aid and regulating eligibility interferred with their ability to sell their athletic "services" to the highest collegiate "bidder," *see id.* at 1342 — the identical theory as petitioner asserts — failed to state a claim on which relief could be granted, because whatever restraints the NCAA rules arguably imposed were not unreasonable as a matter of law.

CONCLUSION

The question of federal antitrust standing that petitioner claims is presented by his petition was not decided by the Minnesota courts of whose decisions the petition seeks review. The questions that those courts did decide are questions solely of state law, which this Court lacks jurisdiction to review. For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted.

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No. 88-540

IN THE

Supreme Court of the United States

October Term, 1988

MARK VANNELLI,

Petitioner,

vs.

THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA AND MINNESOTA COURT OF APPEALS

[REPLY BRIEF]

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September, 1988

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ARGUMENT

This Reply Brief is written because of the most significantly wrong representation (among others) by the NCAA in footnote 7 in its Brief In Opposition to the Petition wherein the NCAA attempts to distinguish the holding by the Fifth Circuit in the **McCormack** case, 585 F.2d 1338 (1988). Significantly, the NCAA failed to address the issue of 'free agency' which is at the heart of Petitioner's antitrust claim. Petitioner's Brief noted that, in the **McCormack** case, the S.M.U. football players had been declared 'free agents' to freely bargain with other schools for their playing services when the 'death penalty' was imposed by the NCAA on the S.M.U. football program. There was no restraint on their bargaining power. In contrast, Petitioner was subject to NCAA transfer restriction rules and thus restrained in his bargaining power with other schools for his playing services. The Fifth Circuit noted, **id.** at 1343, that "the plaintiffs have failed to allege any **facts** contrary" (emphasis added herein) to the reasonability of the NCAA's eligibility rules. The NCAA, in footnote 7, noted that this is "the identical theory as petitioner asserts". Thus, the NCAA incompletely represents that case to this Court by failing to note that, while the "theory" may be identical, the **facts** are readily distinguishable and would lead to a finding of unreasonableness. In **McCormack,** the football players were 'free agents' whereas

the Petitioner here was not a 'free agent'. Petitioner's theory is upheld by the Fifth Circuit.

The NCAA has continued its efforts to further obfuscate the **facts** before this Court and continue to financially burden enforcement of the legitimate rights and concerns of student-athletes. The head of the NCAA in early 1988 publicly criticized the NCAA for its indifference to the rights and concerns of the student-athletes. It is hoped this Court will grant the Petition.

Dated: November 3, 1988.

Respectfully submitted,

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